Supreme Court, U.S.
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No. 99-1715

IN THE

Supreme Court of the United States

RENEE SOPER, a minor, by her mother and next friend, LINA SOPER and LINA SOPER, individually,

Petitioners,

v.

CHRISTINE A. HOBEN, MICHELE HARMALA, ROBERT SHAW, JAMES H. DOYLE, HURON VALLEY SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

The question raised by Petitioners is incomplete. They ask two things. First, is actual notice established when a parent informs a teacher of one incident of alleged sexual harassment? However, to be complete, the question should be if a parent, based on what his or her child says, repeats the information to the teacher, does that create actual notice without regard to the teacher's independent knowledge of the child's propensity for truth and the child's ability to properly perceive, remember, and relate? The second question, more properly stated, should be if the school district decides to take no action based on this one incident, does that, as a matter of law, establish deliberate indifference?

There is a third part to the question that should be addressed before the other two are even answered; i.e., was there sexual harassment that was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational opportunities or benefits provided by the school? Since review of a grant of Summary Judgment by district court is *de novo*, issues regarding the determination of the facts by the district court should be framed relative to the appropriate standard of review.

Therefore, the proper questions become:

(1) Did the United States Court of Appeals for the Sixth Circuit Court correctly apply the standard of review in evaluating the admissible evidence, and allowable inferences therefrom, to the evidence submitted by the Petitioners; and

(2) Did the United State Court of Appeals for the Sixth Circuit Court correctly apply the legal standard established in the *Davis* case to the properly supported facts submitted by the Petitioners?

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COUNTER STATEMENT OF THE CASE

Petitioners infer in their Statement of the Case that the Sixth Circuit did not give proper consideration to the law established by the *Davis* decision and did not properly recognize the significance of certain facts contained in the record. This is simply not true. In applying the legal standard established in *Davis v. Monroe County Board of Education*, 526 U.S. 29, 119 S. Ct. 1161 (1999) to the set of facts in this case, the Sixth Circuit was well aware of the "previous incident" the Petitioners reference in their statement of the questions presented.[1] Further, the Sixth Circuit recognized that Mrs. Soper claimed she expressed concern about Boy A's abusive family background and that she didn't want her daughter left alone with Boy A. It also recognized, as well, that the teacher had two years of prior experience with Boy A as a student without observation of any sexually aggressive conduct. Additionally, the facts establish that the psychological evaluation of Boy A in May 1994 revealed no inappropriate sexual behavior. Petition, Appendix A, pp. 5a-6a. Further, there is no dispute in the record

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1. *The Factual Background* in the Sixth Circuit Opinion states:

> In 1993, while Renee was a student at Oxbow Elementary, Boy A (who is one or two years older than Renee and was then a student in Defendant Michelle Harmala's EMI classroom in the middle school) and Renee left the school boundaries together. Later, Renee told her mother that Boy A had kissed her and said that he could not wait for her to come to junior high. Mrs. Soper reported the incident to [the elementary teacher] and asked her to make sure that someone would keep an eye on Renee and Boy A so as to prevent any further incidents.

Petition, Appendix A, pp. 3a-4a.

that Renee also attended certain "mainstream" classes outside the special education program, and was permitted while in grade school with her parents' consent to walk to these classes unattended. Additionally, while still in grade school, Renee's parents gave the bus driver permission to drop Renee off in front of her home, whether or not anyone was present at the stop to receive her.

On October 6, 1994, there was a parent/teacher meeting at which Mrs. Soper and the teacher discussed a number of issues. Mrs. Soper mentioned nothing about Boys A, B, or C. The only thing mentioned that could even possibly relate to sexual harassment was a "bra-snapping" incident involving a male student other than one of Boys A, B, or C. It is also clear from the record that another subject discussed at this meeting was that Renee had been engaging in "story telling." When Mrs. Soper returned home, she talked to Renee about school and first learned of the rape and fondling. She reported this to the school and the school took immediate action. There is no claim that anything the school did after this notice in any way violated the standards set out in *Davis*.

Petitioners also wondered why the teacher left "Boy A and Renee alone in a classroom" and why that did not, along with other facts known to the teacher, constitute "deliberate indifference." However, the record is clear that the teacher did not knowingly leave the two students alone in the classroom. She allowed Boy A to accompany Renee to her locker in a public area to assist in getting the door open, but the students were able to sneak back in the room without the knowledge of the teacher and hide. It was only after the teacher left, locking the door behind her, that the assault occurred.

It is clear from the record that prior to the rape and fondling the only persons to whom Mrs. Soper said anything about Boy A were the elementary and middle school teachers. The only things that were mentioned were the "kissing incident" and the abuse suffered by Boy in the past. Nothing was ever mentioned about Boys B and C.

REASONS FOR DENYING THE WRIT

In May, 1999 when this Court decided the *Davis* case it examined in detail all the legitimate issues raised here. By incompletely defining the questions presented, Petitioners attempt to create new issues that simply do not exist.

Petitioners have defined the question presented as whether the school district had actual notice of sexual harassment and, having actual notice, whether it reacted with deliberate indifference. By doing so, they attempt to limit the discussion to only two parts of a three part test established by this Court in *Davis* for finding liability under Title IX. Framed this way, the question leaves out a significant part of the test which also requires that the sexual harassment be "so severe, pervasive, and objectively offensive" that it deprives the student of educational opportunities or benefits. The question cannot be stated without including this portion of the test. Further, the question presented assumes that one incident reportedly involving a kiss and a stated desire by Boy A to see Renee at the junior high school amounts to sexual harassment. Additionally, assuming that it was sexual harassment and that it actually happened, the question further assumes that even though the alleged activity occurred off of school grounds, it was sexual harassment upon which the school district could act. Based on the question presented, Petitioner argues that the Sixth Circuit Opinion directly conflicts with the Tenth Circuit's ruling in *Murrell v. School District # 1*, 186 F.3d 1238 (1999). This is not correct.

1.

THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW IN EVALUATING THE EVIDENCE

Summary Judgment is granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule Civil Procedure 56(c). Once the moving party identifies elements of a claim or defense which it believes are not supported by evidence, the non-movement must present affirmative evidence tending to show a genuine dispute of fact in order to avoid Summary Judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). That is, the opposing party must set out sufficient evidence in the record to allow a reasonable jury to find for him at trial. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). The opposing party must demonstrate that there is admissible evidence that will support its position. Inadmissible evidence is not sufficient. This is consistent with the rule that the party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact. *Celotex* at 327. There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec Ind. Co. v. Zena Radio Corp*, 475 U.S. 574, 587 (1986).

The adverse party may not rest upon the mere allegations or denials in the adverse party's pleadings, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, Summary Judgment, if appropriate, shall be entered against the adverse party. *Liberty Lobby* at 256. The

plaintiff is not entitled to a trial merely on the basis of allegations; significant provative evidence must be presented to support the complaint. This requires more than "a scintilla" of evidence in support of this position. *Liberty Lobby* at 252.

Here discovery was closed when the district court ruled on the Motion for Summary Judgment. All provable facts were known to the court.

II.

THE SIXTH CIRCUIT OPINION IN THIS CASE IS NOT IN CONFLICT WITH THE TENTH CIRCUIT'S RULING IN *MURRELL*

In *Davis*, the Court did more than define the scope of behavior that Title IX prescribes, it determined the parameters of actionable "student-on-student harassment" in schools, holding that liability exists only where there is: (1) deliberate indifference to sexual harassment; (2) actual knowledge of the sexual harassment; and (3) sexual harassment that is so severe, pervasive; and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Davis* at 71. In adopting the "deliberate indifference" standard in *Davis* the Court relied upon *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). There the Court rejected a standard of liability for Title IX claims based upon the respondeat superior and/or constructive notice standard and adopted instead a deliberate indifference standard.

> . . . We hold that the damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged

> discrimination and to institute corrective measures on the recipients behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> We think, moreover, that the response must amount to a deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official that is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable for damages not for its own official decision, but instead, for its employee's independent action.

Id. at 289.

Applying this standard, the *Gebser* Court noted that Plaintiffs did not contend that they could prevail under the actual notice standard. *Id.*, 141 L. Ed. 2d at 292. Indeed, the Court noted that the fact that the school principal was aware that the teacher had made inappropriate sexual comments to Plaintiff and other students during class did not rise to the level of actual notice of discrimination. Likewise, the fact that the school district failed to promulgate and publicize an effective policy and procedure for sexual harassment claims, as required by federal regulation, was insufficient to establish

the requisite actual notice and deliberate indifference. *Id.*, 141 L. Ed. 2d at 293.

Applying the standards of *Gebser* to the present case, it is clear that Respondents did not have actual notice of the offending conduct as it was only allegedly reported to an employee and that they were not deliberately indifferent to the alleged discrimination once they received actual notice.

In this case, the Sixth Circuit stated the *Davis* test for liability, only in reverse order; *i.e.*, a claim under Title IX is stated when the plaintiff can

> show (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (2) that the funding recipient had actual knowledge of the sexual harassment; and (3) that the funding recipient was deliberately indifferent to the harassment.

Petition, Appendix A. p. 19a.

Petitioner argues that the decision in *Soper* is in direct conflict with the decision in *Murrell*. This is simply not so. *Murrell*, like *Soper*, was a case where the district court dismissed the plaintiff's claims. The district court did so, however, because it held that "Title IX provides no cause of action for a school's failure to prevent and remedy student-on-student sexual harassment and that the school district had no constitutional duty to protect [the student] from assaults by a fellow student." *Murrell* at 1239. The district court in *Soper*, however, applied the same standard that eventually became the law pursuant to *Davis*, but found that factual support was lacking. The district court ruled:

> When plaintiff's mother informed Defendant Harmala of her daughter's rape, it was the first time Defendant's became aware of the sexual harassment. Plaintiff has not provided evidence that the school board or the teachers should have been aware earlier that plaintiff was subjected to harassment. Although plaintiff was certain that Boy A has a checkered past, she has no evidence to support such an accusation. After the incidents were brought to Defendant's attention, remedial action was promptly taken to provide plaintiff with a safe educational atmosphere. It was Ms. Soper's choice to allow or not to allow plaintiff to return to school.

Petition, Appendix B, p. 46a.

The Tenth Circuit in hearing the appeal from the district court applied the standards set out in *Davis* just as the Sixth Circuit did in *Soper*. The only difference was that the Tenth Circuit made it a four-part test instead of a three-part test. The Tenth Circuit divided the third part of the test in *Davis* into two parts; *i.e.*, "(3) harassment that was so severe, pervasive, and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school." *Murrell* at 1246.

The only reason the outcome in *Murrell* was different is that the facts were so different. The student involved was developmentally disabled and functioning at the level of a first-grader. When she enrolled the principal of the school was informed that she had been sexually assaulted at her prior school. The John Doe in the *Murrell* case was known to have significant disciplinary and behavioral problems

which included engaging in sexually inappropriate conduct. Further, the teachers were aware that he was engaging in aggressive, sexually inappropriate conduct towards a plaintiff, and that he was making harassing phone calls to the plaintiff's home. Further, one of the sexual assaults was discovered in progress by a janitor who advised the teachers. The teachers took no action and not only failed to inform the mom, but attempted to conceal it. After this the plaintiff was sexually assaulted again. The teachers only informed the mom about the non-sexual part of the battery even though they may have known it involved sexual assault. Because of these incidents and because plaintiff began to engage in self-destructive and suicidal behavior, she left school and entered a psychiatric hospital. Only then did the mom learn about the sexual assaults. When the mom contacted the teachers, they denied the incidents and refused to discuss the matter. Following release from the hospital, the plaintiff attempted to return to school but stayed for only one day because she was battered again by Mr. Doe and ridiculed by other students. At a later meeting with the principal and the teachers, and the parents of both students, the principal suggested the contact might have been consensual even though Mr. Doe had admitted assaulting the plaintiff. During this time, the school district neither notified the appropriate law enforcement officials nor took any other corrective action. To say that these facts created a similar situation as that analyzed by the Sixth Circuit in *Soper* and, therefore, *Soper* is in conflict with the Tenth Circuit's Opinion in *Murrell* is totally groundless.

Petitioners have also argued that the quote from *Murrell* offered on page 10 of their petition establishes the factual similarity between the *Soper* case and the *Murrell* case. However, this quote as stated by Petitioners is incomplete

and only begins to recite the extensive list of sexual harassment perpetrated by Mr. Doe on the plaintiff in *Murrell*. To argue that this one item from the incomplete quotation was the one fact on which the Court relied is disingenuous as best. Further, in analyzing the difference in outcomes between the *Soper* and *Murrell* cases, it must be remembered that the dismissal of *Murrell* was based on Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim which requires the Court to take as true all well pled allegations, and the dismissal in *Soper* was based on Federal Rule of Civil Procedure 56(c) which allows dismissal where there is no genuine issue as to any material fact.

III.

THE RULINGS IN OTHER CIRCUITS ARE NOT IN CONFLICT WITH *MURRELL* AND *SOPER*

Since the ruling in *Davis*, seven circuits have applied its holding in ruling on appeals from district courts. However, only three circuits, including the *Murrell* and *Soper* decisions, have addressed student-on-student sexual harassment. The other decisions addressed other issues in light of Title IX and the *Davis* decision such as sexual harassment by a teacher (*Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999)); race discrimination (*Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2nd Cir. 1999)); racial discrimination and funding (*Powell v. Ridge*, 189 F.3d 387 (3rd Cir. 1999)); and the required fielding of womens' fast pitch softball and soccer teams (*Pederson v. Louisiana State University*, 201 F.3d 388 (5th Cir. 2000)).

The only other circuit court case to address student-on-student sexual harassment is *Reese v. Jefferson School District*, 208 F.3d 736 (9th Cir. 2000). In this case, the female plaintiffs on "senior skip day" behaved inappropriately and were disciplined by the school. On skip day, the members of the senior class were transported to a local state park. While at the park, the female plaintiffs hid in the stalls of the boys' bathroom. When a group of senior boys came into the bathroom to change clothes, the plaintiffs ran out of the stalls and threw water balloons at the boys. The school board held a special meeting and barred the plaintiffs from attending the commencement ceremony. The female plaintiffs filed a lawsuit alleging that they were merely retaliating for several acts of sexual harassment committed by the boys during the school year. However, prior to the school board hearing, they had never reported any harassment, and the record offered no evidence that the school district actually knew prior to the school board hearing of the alleged harassment of the female plaintiffs. The boys did not admit to any misconduct and the school conducted no further investigation.

The district court granted Summary Judgment in favor of the school. The Ninth Circuit upheld the dismissal. Although recognizing that the *Davis* decision grew out of *Gebser*, in formulating its opinion, it followed the test established in *Davis* in evaluating the facts. It's clear, therefore, that there is no conflict among the circuits on the application of the *Davis* case to claims of student-on-student sexual harassment.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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